UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 553

Case No. 586: ABRAH

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Ioan Voicu; Mr. Mikuin Leliel Balanda;

Whereas at the request of Michael Anane Abrah, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, the President of the Tribunal, with the agreement of the Respondent, extended to 15 February 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 February 1991, the Applicant filed an application containing the following pleas:

"II. The Pleas

4. The Applicant requests the Tribunal to find:

(i) that the decisions to extend his fixed-term appointment for only six months, and to separate him from the Organization were dictated by improper motives, an unjust post facto evaluation of the Applicant's performance, and serious violations of relevant rules and administrative procedures by the Respondent;

(ii) that an expectancy of renewal of his fixed-term appointment for at least one year, was created as a result of specific actions taken by the Respondent, including a transatlantic conversation between Applicant and the Respondent;

(iii) that the granting of within-grade salary increment, effective 16 June 1989 was an explicit statement of satisfactory performance; a statement which is inconsistent with the so-called special performance report which the Respondent subsequently used as ground for terminating his appointment;

(iv) that as a consequence, the Applicant is entitled to an ex-gratia payment of six months net base salary, less the two weeks ending 31 December 1989 (the date of his actual separation from the Organization) for which he had received a salary, as well as termination indemnity equivalent to two years of completed service (15 June 1988 to 14 June 1990), calculated in accordance with the schedule under Annex III of the Staff Rules;

(v) that the Respondent remove from the Applicant's official status file, the post facto performance evaluation report."

Whereas the Respondent filed his answer on 27 September 1991;

Whereas the Applicant filed written observations on 24 October 1991;

Whereas the facts in the case are as follows:

Michael Anane Abrah entered the service of UNDP on 16 June 1988. He was offered a one year fixed-term appointment, under the 200 Series of the Staff Rules applicable to technical assistance project personnel, as a Treasury Officer in the Division of Finance (DOF) at the L-3 level.

On the expiration of the Applicant's appointment on 15 June 1989, he travelled to Ghana on annual leave accrued during the previous year's service. To this end, and at the Applicant's request, the Administration approved a salary advance.

According to the record of the case, on 13 July 1989, the Chief, Treasury Section, who was also the Applicant's immediate supervisor, telephoned the Applicant in Ghana, to inform him of his decision to extend the Applicant's appointment for six months only. Then, on 2 August 1989, when the Applicant returned to New York, the Chief, Treasury Section, informed the Applicant that his performance had not reached expected standards warranting a one year's extension of his appointment. He would thus recommend a six months' extension to enable the Applicant to find other job opportunities, within or outside UNDP.

On 3 August 1989, the Applicant asked the Chief, Treasury Section, for "a written clarification" of the reasons for not extending his appointment for a year, as well as for a copy of his performance evaluation report. In a memorandum dated 10 August 1989, the Chief, Treasury Section, set forth his evaluation of the Applicant and the reasons that had led him to recommend a six months', instead of a one year's extension of his appointment. On 15 August 1989, the Applicant instituted a rebuttal to this evaluation.

On 5 October 1989, the Deputy Assistant Administrator, Bureau for Finance and Administration (BFA), informed the Chief, Staff Development and Placement Section, Division of Personnel (DOP), of the composition of the panel (the Investigative Panel) he had designated to conduct an impartial investigation of the Applicant's rebuttal.

At meetings held between 6 and 9 October 1989, the Appointment and Promotion Board reviewed a recommendation dated 29 June 1989 by the Deputy Assistant Administrator, BFA, and endorsed on 4 July 1989, by the Staff Development and Placement Section, DOP, to extend the Applicant's appointment for six months only.

In a report dated 23 October 1989, the Investigative Panel submitted its findings on the Applicant's rebuttal to the Deputy Assistant Administrator, BFA. As regards the reasons given by the Chief, Treasury Section, for not extending the Applicant's appointment for a full year, the Panel was satisfied that his assessment that the Applicant "did not achieve a satisfactory level of knowledge of the existing Treasury Systems" was correct. The Panel also noted from the evidence presented, that the Applicant "did utilize the resources available to him, however [it] was unable to determine whether these resources were used effectively." Lastly, with regard to the assessment by the Chief, Treasury Section, that "time was utilized on areas which were not Treasury Section priorities, and which could have been handled by a General Service staff member" the Panel found that "it could not support a situation which would be tantamount to the absence of a chain of command" and that "despite mitigating factors", for example, the fact that "the Applicant was new to the Organization" and that the "technological environment changed within Treasury shortly after his arrival", the weight of evidence support the evaluation by the Chief, Treasury Section of the Applicant's performance.

In a memorandum dated 24 October 1989, the Deputy Assistant Administrator, BFA, informed the Director, DOP, that he saw "no adverse action on the part of [the Chief, Treasury Section, DOF] or any supervisor connected with the Division of Finance." He stated: "the case ... boils down to a simple matter of competence. [The Applicant] still does not have the 'know-how' that we need for the post that he now occupies in the Treasury Section of DOF." He then asked what action would be taken on the case by the Department of Personnel in the light of the recommendation by the Chief, Treasury Section, to extend the Applicant's appointment for six months only. In a letter dated 10 November 1989, a Personnel Officer informed the Applicant that his fixed-term appointment, which expired on 15 June 1989, would be extended for a further period of six months, through 15 December 1989.

On 14 November 1989, the Chief, Staff Development and Placement Section, DOP, transmitted to the Applicant a copy of the Investigative Panel's report, as well as a copy of the Deputy Assistant Administrator's, BFA, communication of 24 October 1989 to the Director, DOP.

On 15 November 1989, the Director, DOP, advised the Applicant that in light of the findings of the Investigative Panel and the recommendation by the Deputy Assistant Administrator, BFA, it had been decided that the Applicant's appointment would "be allowed to expire on 31 December 1989". On the same date, the Applicant asked the Secretary-General to review the administrative decision to extend his fixed-term appointment for six months and 16 days instead of one year.

On 8 February 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 24 September 1990. Its considerations, conclusion and recommendation read as follows:

"Considerations

...

40. ... the Panel had to consider whether, on the basis of approvals of annual leave and salary advance, and in the absence of action to separate the appellant from service upon the expiration of his first contract of appointment, a legitimate expectancy of renewal of appellant's contract had been created in his favour.

41. The Panel observed that it was not standard practice for the Administration to approve accrued annual leave and salary advance with respect to a staff member on a fixed-term appointment whose contract of employment had expired unless a renewal of such appointment was imminent. Nor was it customary for the Administration to fail to take action to separate a staff member or to give notice of such action upon completion of a contract if it was anticipated to be his or her final appointment with the Organization.

42. In this regard, it is the view of the Panel that when the Respondent approved accrued annual leave and salary advance for the appellant upon the expiration of his fixed-term appointment on 15 June 1989 and permitted him to return to his post after the annual leave, and when it failed to take separation action, a reasonable and legitimate expectancy for renewal of his contract was created.

43. However, the Panel felt that the legitimate expectancy created in favour of the appellant was for continuation in employment and not necessarily for specific duration of such employment. Accordingly, it is the view of the Panel that on 10 November 1989 when the appellant's fixed-term appointment was extended for six months, effective 16 June 1989, his legitimate expectancy was honoured, even though the extension was not for one year as the appellant had hoped.

...

45. In this regard, the Panel felt that in light of its finding that the appellant had a reasonable and legitimate expectancy of renewal of his contract which was honoured, it did not have to consider whether or not the contested decision was flawed by procedural irregularities.

Conclusion and recommendation

46. The Panel concludes that the appellant had a reasonable and legitimate expectancy of renewal of his contract which was honoured by the Administration.

47. Accordingly, the Panel makes no recommendation in support of this appeal."

On 28 September 1990, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the contested decision.

On 14 February 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to extend the Applicant's appointment for six months rather than for one year had been taken by the Respondent before the Chief, Treasury Section, prepared the Applicant's evaluation.

2. The Respondent's decision to extend the Applicant's appointment for six months only was flawed by procedural irregularities. The Respondent availed himself of a special performance report to rubber stamp a decision he had taken earlier in the year.

3. The Respondent has failed to substantiate his contention that the performance evaluation report, prior to the expiration of fixed-term appointments, required pursuant to UNDP/ADM/HQTRS/372/Rev.1, applies only when the Respondent intends to extend appointments for one year.

Whereas the Respondent's principal contentions are:

1. The decision to limit the renewal of the Applicant's appointment to 31 December 1989 and not to extend it beyond that date did not infringe his rights.

2. The procedure leading to the decision not to extend the Applicant's appointment beyond 31 December 1989, was not flawed by improper motives, irregularities or lack of due process.

The Tribunal, having deliberated from 9 to 24 June 1992, now pronounces the following judgement:

I. In the present case, the Tribunal has to consider whether, as a result of specific actions taken by the Respondent, the Applicant had an expectancy of renewal of his fixed-term appointment for at least one year. In this respect, the Tribunal took into account the Respondent's decision to approve annual leave and to grant a salary advance before the Applicant proceeded on home leave. The latter occurred after the expiration of the Applicant's fixed-term appointment and there was no action by the Respondent before that date to separate the Applicant from service.

II. The Tribunal notes that, as a holder of a fixed-term appointment, the Applicant had no expectancy of renewal of his appointment. Staff rule 204.3(a) and (d), as well as the Applicant's letter of appointment, state clearly that fixed-term appointments do not carry an expectancy of renewal or of conversion to any other type of appointment. Moreover, staff rule 209.2(b) provides that separation from service on the expiration of a fixed-term appointment takes place automatically and without prior notice on the expiration date specified in the letter of appointment. In this connection, the Tribunal has consistently held that: "The decision whether or not to renew a fixed-term appointment is within the discretion of the Secretary-General and, in the absence of countervailing circumstances, non-renewal will not give rise to any rights on the part of the staff member." (Cf. Judgement No. 199, Fracyon (1975), para. I).

III. The Tribunal finds no evidence that the UNDP Administration entered into a binding commitment to renew the Applicant's fixed-term appointment for one year or longer. On the contrary, the Applicant was informed that since his performance had not reached expected standards to justify a one-year renewal of his appointment, he would be granted a six months' extension to enable him to find other job opportunities.

IV. In connection with the above-mentioned notification, the Tribunal recalls Judgement No. 319, Jekhine (1983), para. I, in which it stated, inter alia:

> "I. The Tribunal does not question the right of the Respondent not to renew a fixed-term contract but would stress, as stated in numerous cases before it, that the discretionary power of the Respondent in this field should be free of any improper motive or prejudice. The Tribunal has also held that while a fixed-term contract cannot create any legal expectancy for its continuance or renewal, reasonable expectation for extension can often arise from the totality of circumstances surrounding a staff member's separation from service, and that such expectation should be taken into account."

V. Taking into account the totality of the circumstances of this case, the Tribunal concurs with the Joint Appeals Board finding, that it was not standard practice for the Respondent to approve home leave travel on accrued annual leave and authorize a salary advance to a staff member holding a fixed-term appointment that was about to expire, or had expired, unless the Respondent intended to renew such an appointment. The Tribunal also notes that it was not customary for the Respondent to omit informing a staff member in advance that he would not extend his or her appointment, if that was his intention.

VI. In the light of these circumstances, the Tribunal is of the view that, when the Respondent approved home leave travel on accrued annual leave, authorized a salary advance for the Applicant upon the expiration of his fixed-term appointment on 15 June 1989, and allowed him to resume his functions after returning from home leave, a reasonable expectancy was created that the Applicant's contract would be extended.

VII. However, the Tribunal concurs with the Joint Appeals Board's conclusion that this expectancy was for continuation of the Applicant's employment, but not necessarily for an additional year. Therefore, the Tribunal considers that on 10 November 1989, when the Applicant's fixed-term appointment was extended for six months, with effect from 16 June 1989, the Respondent fulfilled the Applicant's expectancy, even though the extension granted was not for one year, as the Applicant had hoped.

VIII. The Tribunal notes also that the extension of the Applicant's appointment for six months, through 31 December 1989, allowed for completion of the rebuttal process initiated by the Applicant against the evaluation of his performance by his supervisor. In this regard, the Tribunal recalls Judgement No. 138, Peynado (1970), para. VI, in which it stated:

> "The Staff Rules and Administrative Instructions provide a measure of protection against arbitrary assessment of the efficiency or performance of staff members. In particular, the right of rebuttal of any part of a periodic report and the procedure prescribed for handling such rebuttal afford a valuable protection to the staff member against arbitrary or prejudicial assessment."

In the light of the findings and conclusions of the Investigative Panel set up by the Administration to review the Applicant's rebuttal, the Respondent had an entirely reasonable basis for confirming the decision not to extend the Applicant's appointment beyond 31 December 1989.

IX. The Tribunal now turns to whether the procedure leading to the contested decision not to extend the Applicant's appointment beyond 31 December 1989, was flawed by improper motives, irregularities or lack of due process. In this respect, the Tribunal has consistently held that: "The burden of proving prejudice or improper motivation rests with the Applicant." (Judgement No. 93, Cooperman (1965), para. XII). Accordingly, an Applicant alleging that a discretionary administrative decision is tainted by prejudice or improper motivation must adduce convincing evidence. In the present case, the Tribunal finds, as did the Joint Appeals Board, that the Applicant has produced no evidence to substantiate his allegation that improper motives or prejudice were behind the Respondent's discretionary decision not to extend his appointment beyond 31 December 1989.

X. As to the allegations concerning procedural irregularities and lack of due process, the Tribunal finds some instances of administrative negligence. For example, the failure to complete a performance evaluation report, as required, prior to the expiration of the Applicant's appointment and the preparation of a post facto evaluation are undesirable practices. However, the Tribunal finds that the Applicant has suffered no injury as a consequence and therefore his pleas in these respects cannot be sustained. The Applicant's case was investigated thoroughly, and he was accorded full opportunity to be heard during the Investigative Panel proceedings in which the requirements of due process were met.

XI. Nevertheless, the Tribunal considers it appropriate to reiterate its views as expressed in Judgement No. 504, Coulibaly (1991), para. XII, that: "... the Administration should ensure that procedures concerning fixed-term appointments should, in the future, be strictly observed." That consideration is also applicable to the present case.

XII. For the foregoing reasons the Tribunal:

1. Rejects the application.

2. Orders the Respondent to incorporate a copy of this judgement in the Applicant's personnel file.

(Signatures)

Jerome ACKERMAN
President

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

Geneva, 24 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary